

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESA BATRES)	
Claimant)	
)	
VS.)	
)	
EVCON INDUSTRIES INC.)	
Respondent)	Docket No. 250,033
)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Nelsonna Potts Barnes' Award dated November 21, 2001. The Board heard oral argument on May 10, 2002.

APPEARANCES

Claimant appeared by her attorney, Alexander B. Mitchell, II of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is a claim for an October 18, 1999, accident, which the parties stipulated arose out of and in the course of employment with respondent. The Administrative Law Judge (ALJ) determined claimant suffered a 39 percent task loss and a 31 percent wage loss as a result of the accident. Consequently, the Judge awarded claimant a 35 percent permanent partial general disability.

On review the respondent and its insurance carrier request the Board to determine the issue of the nature and extent of disability. That is the sole issue raised.

Respondent and its insurance carrier contend claimant should be limited to her functional impairment rating because Dr. Philip R. Mills had released her to return to work without restrictions and claimant did not return to work. But in the alternative, respondent and its insurance carrier argue that if claimant is entitled to a work disability, the ALJ's determination should be adopted.

Conversely, claimant argues she acted in good faith and is entitled to a work disability. She could no longer perform her job duties without pain and although she requested accommodation, respondent failed to provide accommodated work or a position within the restrictions provided by Dr. Amayo. Claimant further argues the task loss portion of the work disability formula should not include Dr. Mills' 0 percent opinion because his restriction to use good body mechanics is vague and not realistic. Claimant concludes the ALJ's wage loss determination should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered a work-related injury on October 18, 1999. On that date claimant was performing her job duties as an assembler. She was working on a line putting the control box in an air conditioner. The job required claimant to work bent over and by the end of the workday claimant's back was hurting.

Claimant went to the emergency room for treatment because of the back pain. Thereafter, claimant was referred to Dr. John F. McMaster for treatment. Claimant also sought chiropractic treatment on her own in November 1999. On November 24, 1999, Dr. McMaster ordered an MRI which revealed degenerative changes with degenerative disk disease, especially at L5-S1; a diffuse disk bulge at L3-4 and L4-5 with mild spinal canal and bilateral neural foraminal narrowing of L3-4. At L5-S1 there was a right paracentral disk bulge without significant spinal canal or neural foraminal narrowing.

In December 1999, claimant was referred to Dr. Paul Stein. Dr. Stein opined claimant had dessication with mild degenerative changes at L5-S1 with mild disk bulging at the two levels above. The doctor recommended a back therapy rehabilitation program with strengthening and weight reduction.

On December 23, 1999, claimant's attorney referred her to Dr. Pedro A. Murati for examination and treatment recommendations. Dr. Murati recommended additional nerve conduction diagnostic testing and based upon the results of the testing he would further

recommend physical therapy, medications and possibly a series of lumbar epidural steroid injections. Dr. Murati placed the following restrictions on claimant: (1) lift/carry/push/pull no more 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly; (2) occasionally bend, climb stairs, climb ladders, and squat; (3) no crawling; (4) frequent drive; and, (5) use good mechanics at all times. The doctor noted the claimant can frequently sit, stand and walk. But she is to alternate these positions. Dr. Murati concluded claimant had a 10 percent permanent partial impairment to the whole body.

The record is unclear regarding the dates of treatment but claimant also saw Dr. Amayo for her back condition. Dr. Amayo referred claimant for physical therapy but claimant noted the physical therapy worsened her condition. In January 2000, Dr. Amayo imposed restrictions of occasional bending, climbing stairs, ladders, squatting and crawling. Claimant could frequently stand and walk. Claimant could constantly sit and do repetitive hand activities. Dr. Amayo imposed weight limitations of 50 pounds occasionally, 20 pounds frequently and 10 pounds constantly.

Claimant noted that when Dr. Amayo released her to work with restrictions the respondent had her performing her regular job duties. Claimant provided respondent the restrictions from Dr. Amayo. Claimant noted that the work activities, especially bending over, twisting and picking up heavy items made her back hurt. When claimant complained to her supervisor and requested another job assignment she was ignored. Claimant continued working without any accommodations in her job duties through April 11, 2000.

Respondent referred claimant to Dr. Mills on April 11, 2000. Dr. Mills diagnosed mechanical low back pain and imposed restrictions that claimant should work only with good body mechanics. The doctor concluded claimant should undergo a short course of outpatient physical therapy to instruct claimant in back care and home pain relief modalities.

After she went to Dr. Mills for examination, claimant called respondent and indicated she was not returning to work because her back was hurting too much. When claimant did not return to work she was terminated for violating respondent's attendance policy. Claimant sought and obtained other employment within three weeks. She had worked at three different jobs since leaving employment with respondent but at the time of the regular hearing had been unemployed for three weeks and had made no effort during that period to find employment.

Because claimant's is an "unscheduled" injury, her permanent partial disability benefits are governed by K.S.A. 44-510e(a) which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged

together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510e(a) allows a work disability in excess of the functional impairment only if the claimant is making less than 90 percent of his or her pre-injury average gross weekly wage. The cases interpreting K.S.A. 44-510e have added the additional requirement that an employee must set forth a good faith effort to secure appropriate employment before a work disability will be awarded.¹

In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.² An employee is not required to seek post-injury accommodated employment with the employer in every case.³ An employee may be entitled to a work disability after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.⁴

Respondent first argues claimant is not entitled to work disability because she voluntarily left her employment after Dr. Mills released her, without restrictions, to return to work.

The record indicates respondent was aware of claimant's continued complaints of back pain as a result of performing her job duties. It was claimant's uncontradicted testimony that she provided respondent with the work restrictions imposed by the treating doctor and requested a transfer to a different job. Her restrictions and her request for a

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

² *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

³ *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

⁴ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P. 2d 288, rev. denied 267 Kan. 889 (1999).

transfer were ignored. Respondent had notice of claimant's ongoing physical difficulties but did not act to provide accommodated work.

Although Dr. Mills released the claimant to return to work with the restriction to use good body mechanics, during his deposition he further indicated claimant should avoid bending and twisting because that would place her at significant risk of re-injury. It was claimant's uncontradicted testimony that bending and twisting was required to perform her job duties and such activity continued to cause her back pain.

Under the factual situation presented, the Board finds that *Foult* does not apply. The Board finds that claimant was justified in resigning her position after her restrictions were ignored and her request for a job transfer refused. After her injury, claimant continued performing regular job duties and knew the physical problems it had continued to cause. The Board finds claimant was unable to continue performing her assembler job in April 1999 when she resigned in her then-injured state. Also, the Board finds the requirements of that job were beyond her permanent work restrictions and limitations.

On the day the claimant resigned she was physically unable to do her job. She resigned of necessity and immediately found other work. This demonstrates good faith. However, after leaving a succession of jobs where she worked after her resignation from respondent, claimant was not engaged in any effort to find employment when the regular hearing in the case was held. Accordingly, the ALJ imputed a wage for the wage loss prong of the work disability formula and that finding was not contested by the parties. The Board affirms the ALJ's determination claimant suffered a 31 percent wage loss.

The ALJ averaged the task loss opinions of the two physicians who testified in this case. Dr. Mills reviewed Karen Terrill's task list and utilizing the permanent work restriction he imposed, opined that claimant did not have any task loss. Dr. Murati reviewed Karen Terrill's task list and utilizing the permanent work restrictions he imposed opined that claimant could no longer perform 14 of the 18 tasks for a 78 percent task loss. Considering the entire record, the Board finds both physicians task loss opinions should be given equal weight because claimant's appropriate task loss lies somewhere between Dr. Mills' 0 percent task loss percentage and Dr. Murati's 78 percent task loss percentage. Accordingly, the Board adopts and affirms the ALJ's finding claimant suffered a 39 percent task loss.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna P. Barnes dated November 21, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Alexander B. Mitchell, II, Attorney for Claimant
 Vincent A. Burnett, Attorney for Respondent
 Nelsonna P. Barnes, Administrative Law Judge
 Director, Division of Workers Compensation